95-1630 (3)

Supreme Court, U.S.
FILED
MAY 13 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ANTOINE NASSIMOS, JOSEPH FICHNER, JR., MICHAEL CONROY, ANTHONY ROSSI, DANIEL W. WELTMAN, GEORGE STEINER, WILLIAM A. MOORE, WILLIAM TEDESCO, MICHAEL IGNOZZI and ALAN HANZO,

Petitioners,

vs.

THE NEW JERSEY BOARD OF EXAMINERS OF MASTER PLUMBERS; NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC.; BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS; and ROBERT MULLER, individually and in his capacity as an officer of the NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, THOMAS BIONDI and ALAN FEID,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS NEW JERSEY ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS, INC. AND BAYSHORE ASSOCIATION OF PLUMBING, HEATING AND COOLING CONTRACTORS

ROBERT J. ROHRBERGER
Counsel of Record
DAVID I. FOX
FOX AND FOX
Attorneys for Respondents New Jersey Association of Plumbing, Heating and Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors
570 Broad Street
Newark, New Jersey 07102
(201) 622-3624

290

QUESTIONS PRESENTED FOR REVIEW

1. Were the decisions of the District Court and the Court of Appeals in this case that the enforcement by a state agency of a state regulation prohibiting excessive prices did not constitute a conspiracy to restrain trade and was within the scope of state action immunity to Sherman Act liability inconsistent with the decisions of this Court in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) or *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992)?

2. May a private party be held liable under the Sherman Act based upon an allegation that it participated in a conspiracy with a state agency to fix prices in violation of the Sherman Act through the enforcement by the state agency of a state regulation prohibiting excessive prices, when the regulation and its enforcement plainly do not constitute a conspiracy to restrain trade and when the actions of the state agency are themselves within the scope of state action immunity to Sherman Act liability?

3. May a trade association which represents no more than four percent of the members of an occupation in a state be held liable for horizontal price fixing in an action by competitors in the occupation of the members of the association, when it is undisputed that the association does not prescribe a particular price or price ranges which must be charged by its members, that any communications regarding prices which may have occurred between members did not occur at association meetings but only following such meetings and were undertaken by an expert witness engaged by the state to gather information about prices charged in the industry, that such alleged communications had no

affect on the ability of the plaintiffs to charge for their services as they chose, and that there is no allegation in the case of predatory pricing?

PARTIES TO THE PROCEEDING

Petitioners are ten individuals who are engaged in the trade of plumbing in the State of New Jersey. Eight of the plaintiffs are licensed master plumbers in the State of New Jersey. The other two plaintiffs have applied for licenses. Petitioners were all plaintiffs before the District Court.

Respondent The New Jersey Board of Examiners of Master Plumbers (the "Board") is an administrative body within the Division of Consumer Affairs of the Department of Law and Public Safety of the State of New Jersey. It was created pursuant to N.J.S.A. 45:14C-1, *et seq.* and is authorized by the New Jersey State Legislature to license and regulate master plumbers.

Respondent the New Jersey Association of Plumbing-Heating-Cooling Contractors ("NJAPHCC") is a statewide trade association of plumbing, heating and cooling contractors.

Respondent Bayshore Association of Plumbing, Heating and Cooling Contractors ("Bayshore") is a trade association of plumbing, heating and cooling contractors and is a local affiliate of the NJAPHCC. (NJAPHCC and Bayshore are collectively referred to herein as the "Trade Associations").

Respondents Thomas Biondi ("Biondi") and Alan Feid ("Feid") are members of the NJAPHCC and served as chairmen of the Board during past administrative disciplinary hearings concerning Petitioner Joseph Fichner, Jr. ("Fichner").

Respondent Robert Muller ("Muller") is a member of the NJAPHCC and Bayshore who testified as an expert on behalf of the State of New Jersey at the hearings conducted by the Board concerning Petitioner Fichner.

Respondents were all defendants before the District Court.

The Attorney General of the State of New Jersey has represented the Board as well as Biondi, Feid and Muller (the "Individual Respondents") and is submitting a separate brief in opposition to the Petition for Writ of Certiorari. This brief is submitted on behalf of the Trade Associations.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	iii
Table of Contents	v
Table of Citations	vi
Statement of the Case	1
A. The Relevant Facts	1
1. New Jersey's System for the Regulation and Licensing of Plumbers.	1
2. The Board's Administrative Proceedings With Regard to Petitioner Fichner.	3
3. The Respondent Trade Associations.	4
B. The Proceedings Below	6
Reasons for Denying the Writ	10
I. The District Court And The Court Of Appeals Did Not Rule That Independent Violations Of The Sherman Act By Private Parties Were Immunized By Subsequent Action By A State Agency.	10

Contents

Page

II. The Decisions Of The District Court And The Court Of Appeals In This Case Are In No Way Inconsistent With The Decisions Of This Court In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) Or *Federal Trade Commission v. Ticor Title Insurance Company*, 504 U.S. 621 (1992). 14

III. The District Court's Determination That The Reasonable Foreseeability Element Of State Action Immunity Was Satisfied In This Case Was In Accordance With The Principles Set Forth In *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991). 17

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

American Trial Lawyers Association v. New Jersey Supreme Court, 66 N.J. 258 (1974) 19

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1989) 13

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... i, 14, 15, 16

Contents

Page

Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991) ..... i, 8, 10, 11, 15, 16, 17, 18, 19

Federal Trade Commission v. Ticor Title Insurance Company, 504 U.S. 621 (1992) ..... i, 14, 15, 16

Fisichelli v. City Known as Town of Methven, 956 F.2d 12 (1st Cir. 1992) 18

Matsushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574 (1985) 13

Statutes Cited:

15 U.S.C. § 1 1

15 U.S.C. § 15 13

N.J.A.C. 13:32-1, *et seq.* 2

N.J.A.C. 13:32-1.12 ..... 2, 3, 5, 6, 7, 8, 11, 13, 14, 15, 16, 17, 18

N.J.A.C. 13:35-6.11 2

N.J.A.C. 13:44E-2.13 2

N.J.S.A. 45:14C-1, *et seq.* iii

N.J.S.A. 45:14C-3 2

N.J.S.A. 45:14C-7 2

Contents

Page

Rules Cited:

United States Supreme Court Rule 10.1 10

United States Supreme Court Rule 15.1 1

New Jersey Rule of Professional Conduct 1.5 2

STATEMENT OF THE CASE[1]

This action represents an attempt by the Petitioners to use the Sherman Anti-Trust Act, 15 U.S.C. § 1, to attack the system whereby the State of New Jersey regulates plumbers who practice their trade in the State. The United States District Court for the State of New Jersey and the United States Court of Appeals for the Third Circuit have rightly held that this effort by Petitioners is precluded by the state action exception to the Sherman Act.

A. The Relevant Facts

1. New Jersey's System for the Regulation and Licensing of Plumbers.

The New Jersey State Legislature has established an administrative system whereby individuals wishing to practice certain professions and occupations, ranging from accountants to veterinarians, must obtain licenses from and submit to regulation by specialized professional boards and commissions. Such boards and commissions are State agencies and their members are appointed by the Governor. *See* New Jersey Statutes Annotated, Title 45.

To regulate the trade of plumbing, the New Jersey State Legislature has created an administrative board known as The State Board of Examiners of Master Plumbers and granted to it the authority to adopt, amend and promulgate rules and

---

1. The Statement of the Case in Petitioners' Petition for Writ of Certiorari omits certain significant facts contained in the record below. Although Petitioner's application for certiorari, and indeed the issues presented by this case, can be decided without resort to these facts, the Trade Associations set them forth in this Statement of the Case pursuant to Sup. Ct. Rule 15.1.

regulations. *See* N.J.S.A. 45:14C-3; N.J.S.A. 45:14C-7. The Board has in turn adopted a comprehensive set of regulations which apply to all of the approximately 8,000 licensed plumbers who do business in the State of New Jersey. *See* N.J.A.C. 13:32-1, *et seq.*

One of the regulations which has been adopted and enforced by the Board prohibits unconscionable pricing by plumbers. *See* N.J.A.C. 13:32-1.12.[2] Pursuant to that regulation, the Board possesses the authority to sanction plumbers for charging unconscionable prices. In determining whether a price is unconscionable the Board is charged with considering six non-exclusive factors including "the price customarily charged in the locality for similar services."

This case arises out of Petitioners' dissatisfaction with the Board's adoption and enforcement of N.J.A.C. 13:32-1.12 and in particular with the Board's determinations in two separate proceedings that Petitioner Joseph Fichner, Jr. was guilty of unconscionable pricing. Respondent Muller testified as an expert witness on behalf of the State at both of the proceedings relating to Fichner. Respondent Biondi served as Chairman of the Board during the first proceeding and Respondent Feid served in that capacity during the second proceeding.[3]

---

2. Similar rules regulations have been adopted by the boards which regulate other professions and by the New Jersey Supreme Court in connection with its authority to regulate the practice of law in the state. *See e.g.*, N.J.A.C. 13:35-6.11 (Physicians); N.J.A.C. 13:44E-2.13 (Chiropractors); Rules of Professional Conduct 1.5 (Attorneys).

3. Petitioners note that Respondents Biondi and Feid were both members of NJAPHCC when they chaired the Board. However, it should be noted that the Board consists of nine members who are selected from such diverse groups as licensed master plumbers, inspectors, representatives and

(Cont'd)

Petitioners allege that determinations by the Board in the two Fichner administrative proceedings that Fichner was guilty of unconscionable pricing somehow constituted price fixing. Moreover, Petitioners contend that the Board made those determinations, not in a good faith effort to implement its lawful authority, but as a result of a conspiracy between the Board, Biondi, Feid, Muller, and the Trade Associations.

2. *The Board's Administrative Proceedings With Regard to Petitioner Fichner.*

The Board has twice found that Petitioner Fichner has engaged in precisely the type of conduct which N.J.A.C. 13:32-1.12 was intended to eliminate, *i.e.*, the price-gouging of unknowing consumers. In coming to this conclusion, the Board considered evidence ranging beyond the prices charged by others in the industry. As demonstrated in the final decisions and orders included in the record (Ja-38, Ja-59, Ja-90), the Board considered the full panoply of facts relevant to its determination.

Thus, in 1988, the Attorney General of the State of New Jersey filed a six-count administrative complaint accusing Fichner of deceptive and misleading practices. Specifically, Fichner was charged with inducing five consumers to enter into contracts for plumbing services and charging those consumers prices which were excessive for the materials and services provided. (Ja-28). The Board reprimanded Fichner, ordered him to pay restitution and imposed a $5,000 civil penalty. These penalties were based on a finding by the Board that Fichner had engaged in unconscionable pricing practices. (Ja-38, Ja-59). This decision was affirmed by the Appellate Division of the Superior Court of the State of New Jersey. (Ja-76).

(Cont'd)
the public at large. At any given time, only one member of NJAPHCC was a member of the Board. Thus, Biondi and Feid never served on the Board simultaneously. (Ja-218).

In 1992, the New Jersey Attorney General filed a second disciplinary complaint against Fichner. Fichner was charged with having engaged in deceptive sales practices whereby he charged unconscionable prices to seven consumers. (Ja-79). The Board found Fichner guilty of occupational misconduct, imposed civil penalties of $35,000 and costs of $9,844.50, and required Fichner to pay restitution. (Ja-90). The Appellate Division reversed and remanded this decision on the grounds that certain members of the Board did not meet the statutory requirements for holding that office. The Appellate Division did not disagree with the Board's findings regarding Fichner. On the contrary, the Appellate Division commented on "what [the Board] *understandably* considered to be his egregious conduct in continuing to engage in unconscionable commercial practices . . ." (Emphasis added). The Attorney General appealed and the case is now pending before the New Jersey Supreme Court.

In each of the administrative proceedings with regard to Fichner, the New Jersey Attorney General engaged Respondent Muller to testify as an expert. Among other things, Muller testified regarding "the price customarily charged in the locality for similar services." Solely as a means of gathering information in preparation for his testimony, Respondent Muller engaged in certain occasional communications with other plumbers regarding pricing. These communications were not part of any official agenda or business of the Trade Associations. They occurred after Trade Association meetings had been concluded, solely because the meetings provided a useful social forum for Muller at which he could meet with others in the industries who were knowledgeable about prices that are charged for services rendered. (Ja-23).

3. The Respondent Trade Associations.

Respondents NJAPHCC and Bayshore are small

incorporated trade associations. NJAPHCC was formed in, and has operated continuously since, 1902. Its members generally include people engaged in the plumbing, heating, and air conditioning fields in the State of New Jersey. (Ja-26). Bayshore is one of 15 local affiliates of NJAPHCC and members of Bayshore are also members of NJAPHCC. Bayshore draws its membership from contractors in the northern Monmouth County and southern Middlesex County areas. Membership in each Trade Association is voluntary and there is no requirement that a contractor in the plumbing, heating or air conditioning fields belong to either organization. As a result, NJAPHCC and Bayshore do not represent all of the contractors in the various industries from which they draw their members. (Ja-26). Indeed, NJAPHCC presently has a total of approximately 550 members, only approximately 350 of whom are licensed plumbers. (Ja-217). Bayshore presently has only 50 members, only some of whom are licensed plumbers. Thus, within an industry of approximately 8,000 licensed plumbers in the State of New Jersey, the membership of NJAPHCC and Bayshore represent only approximately 4% and substantially less than 0.7% of the total, respectively.

It is undisputed that neither NJAPHCC nor Bayshore had involvement with or input as to the adoption, enactment or enforcement of N.J.A.C. 13:32-1.12 by the Board. In fact, neither Trade Association has had any contact with the Board concerning the rule or its enforcement. (Ja-23, 26).

Moreover, it is undisputed that there has been no attempt by NJAPHCC or Bayshore to prescribe a particular price or price ranges which must be charged by their members. Members are left to structure their own prices and price ranges which they will charge for particular services to their customers. (Ja-26). Even the discussions regarding prices testified to by Respondent Muller upon which Petitioners place such great reliance were not

part of any official agenda or business of the Trade Associations at the meetings at which they occurred. Indeed, these discussions invariably occurred after the meetings had been concluded. (Ja-23). These discussions were undertaken by Muller solely as a means of gathering information in preparation for his testimony at the hearings concerning Fichner. (Ja- 23). As noted above, they occurred following Trade Association meetings, solely because the meetings provided a useful forum for Muller to meet others in the industry who were knowledgeable about prices charged for services rendered. (Ja-23).

Moreover, neither NJAPHCC nor Bayshore — representing 4% and less than 0.7% of plumbers in New Jersey — has the type of market power which would even permit it to engage in an effort to establish, stabilize or fix prices. Indeed, it is apparently their recognition that the Trade Associations lack the power to fix prices that has lead Petitioners to expressly state in their complaint that nothing done by the Trade Associations alone has affected their ability to charge the prices that they choose for their services and to instead ground their allegations of price fixing exclusively on the actions of the Board in enforcing N.J.A.C. 13:32-1.12. (*See* Section B, *supra.*).

B. The Proceedings Below

Petitioners filed their complaint in this matter on March 17, 1994 and subsequently filed their Amended Complaint on May 27, 1994. Petitioners' claims are grounded in their allegations that the Board has used N.J.A.C. 13:32-1.12 to fix the prices which plumbers can charge for their services as a result of a conspiracy with the Trade Associations, Biondi, Feid and Muller.

Petitioners' Amended Complaint alleges that the Board, through its adoption and implementation of N.J.A.C. 13:32-

1.12, is coercing Petitioners to change fixed prices under threat of being sanctioned if they fail to do so. Petitioners rely specifically on the administrative proceedings in which Petitioner Fichner was fined and otherwise sanctioned for violations of N.J.A.C. 13:32-1.12. (Am. Complaint, Count I ¶ 9, Count II ¶¶ 2, 3 & 5). Petitioners accuse Respondent Muller of using his testimony before the Board to communicate to the Board rates allegedly discussed by members of the Trade Associations. As a result of this testimony by Muller, Petitioners accuse Muller, the Trade Associations and the Board with conspiring to fix the prices which may be charged by Plumbers for their services. (Am. Complaint, Count II ¶¶ 3-4). Petitioners also accuse Respondents Biondi and Field of using their positions as Board members and NJAPHCC members to advance this conspiracy. (Am. Complaint, Count I ¶ 8). Based on these allegations, Petitioners charge the Board, NJAPHCC, Bayshore and the Individual Respondents with violating the Sherman Anti-Trust Act.[4]

Thus, the crux of Petitioners' allegations is that the Board has fixed prices and that it has done so as a result of a conspiracy between the Board, the Trade Associations, Biondi, Feid and Muller. Although Petitioners allege in the Amended Complaint that members of NJAPHCC and Bayshore engaged in discussions at their respective meetings regarding "the prices charged and to be charged to consumers by the associations' members" (Am. Complaint, Count I ¶ 1), Petitioners expressly assert that these alleged discussions have had no impact on the ability of each Petitioner "to charge for his services as he determined in his discretion." (Am. Complaint, Count I ¶ 4). Instead, Petitioners rely exclusively on the alleged actions of the

---

4. In their petition, Petitioners inaccurately state that they have asserted claims under the New Jersey Antitrust Act. No such claims can be found in the Complaint or the Amended Complaint.

Board to support their allegation that they have been deprived of their ability to determine the prices at which they sell their services. (Am. Complaint, Count I ¶ 5). Thus, the allegations regarding the Trade Associations are inextricably intertwined with and are dependant on the allegations regarding the Board.

The New Jersey Attorney General (on behalf of the Board, Biondi, Feid and Muller) and the Trade Associations responded to Petitioners' Amended Complaint by filing motions for summary judgment and dismissal on the grounds, among others, that the alleged conduct by the Respondeo ' in connection with the adoption and enforcement of N.J.A.C. 13:32-1.12 was within the scope of the state action exception to Sherman Act liability. Petitioners subsequently filed a cross-motion seeking preliminary equitable relief.

On January 19, 1995, the United States District Court entered a Memorandum and Order dismissing the complaint as to all Respondents. (Ja-239). The District Court first held that the State action exception to liability under the Sherman Act applied to the actions by the Board which are the subject of Petitioners' Amended Complaint. (Ja-247). The District court also noted that, as this Court held in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), there is no conspiracy exception to state action immunity. Turning to the claims against the Trade Associations, the District Court recognized that, because the Board's actions in enforcing the Rule were found to be legally permissible, the charge that the Trade Associations conspired with the Board in connection therewith similarly had to fall. The District Court also found that there was simply no evidence that the alleged conspiracy had resulted in fixed prices. In addressing the claims against the Trade Associations, the Court stated:

> There is simply no support for plaintiff's

> assertion that the Board's enforcement of the requirement that plumbers not charge unconscionably excessive prices has effectively "fixed" the price which a licensed plumber may charge for plumbing services. Indeed, evidence of the price customarily charged in the locality for similar services is only one of six factors which may be considered in determining whether a price charged is excessive within the meaning of the rule. Plaintiffs' theory of a conspiracy to fix prices rests on the allegation that the Board is wrongfully enforcing N.J.A.C. 13:32-1.12 and since this allegation is without merit, plaintiffs' assertions of an antitrust violation fails as to defendants NJAPHCC and Bayshore as well.

(Ja-248). Finally, the District Court denied Petitioner's motion for preliminary relief on the grounds that all issues in the complaint had been decided in favor of the Respondents. (Ja-249).

Petitioners appealed and the United States Court of Appeals for the Third Circuit affirmed the District Court decision. The Third Circuit stated that:

> After consideration of all contentions raised by the parties, we find that the above action is directly controlled by the decision in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379 (1991).

Petitioners moved for reconsideration and reconsideration en banc. Both motions were denied.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS DID NOT RULE THAT INDEPENDENT VIOLATIONS OF THE SHERMAN ACT BY PRIVATE PARTIES WERE IMMUNIZED BY SUBSEQUENT ACTION BY A STATE AGENCY.

Petitioners contend that the decisions by the District Court and the Third Circuit Court of Appeals in this case were inconsistent with the holding of this Court in *Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379 (1991) in that they allegedly immunized Sherman Act violations by private parties, which were independent of any state action, based solely on subsequent adoption of the private actions by a state agency.[5] However, the decisions below did no such thing. Contrary to the suggestions in the Petition for Writ of Certiorari, the Amended Complaint does not even *assert* any claims against the Trade Associations which are independent of the claimed state action. Indeed, Petitioners' allegations in the Amended Complaint make it clear that this case does not involve alleged independent violations of the Sherman Act by the Trade Associations. It is rooted exclusively in alleged violations of the Act by a state agency which allegedly resulted from a conspiracy with private

---

5. Pursuant to Supreme Court Rule 10.1, "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." The only argument apparently made by Petitioners that such "special and important reasons" exist in this case is their contention, in each of the three points in the Petition, that the determinations by the District Court and the Court of Appeals were not in accordance with certain decisions by the United States Supreme Court. Petitioners do not contend that any other grounds for a finding of "special and important reasons" (whether listed in Rule 10.1 or otherwise) is present in this case.

parties. This is precisely the scenario which this Court, in *Omni*, held could not serve as a basis for liability under the federal antitrust laws.

This Court's decision in *Omni* made it clear that there is no conspiracy exception to the state action exception to Sherman Act liability. In other words, an action which would be exempt from Sherman Act liability does not become subject to such liability solely because it allegedly resulted from a "conspiracy". *See Omni*, 499 U.S. at 379. Indeed, in *Omni*, this Court expressly rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade' ". *Id.* (citations omitted). Petitioners' allegations in this case fall squarely within this ruling. Petitioners have alleged that the Board used its authority to enforce the prohibition on excessive pricing in N.J.A.C. 13:32-1.12 as a means of price fixing, because of an alleged conspiracy with the Trade Associations, Biondi, Feid and Muller. Thus, the District Court's dismissal of the claims against the Board, the Trade Associations and the Individual Respondents, and the Third Circuit's affirmance of the dismissal, were appropriate and should be affirmed.

Petitioners are now attempting to circumvent the main holding of *Omni* by focusing on an irrelevant and subsidiary aspect of the case. In *Omni*, there were two sets of allegations against the private party defendants. First, the plaintiff alleged that the private party defendants conspired with the City of Columbia to have the City adopt certain resolutions regarding the size and locations of billboards. 499 U.S. at 369. Second, the plaintiff alleged that the private parties engaged in other, independent anti-competitive actions, such as trade libel, the setting of artificially low rates and the inducement of breach of contract which allegedly gave rise to independent causes of action. *Id.* at 384. It was this second set of independent allegations which this Court

held was not within the scope of the state action exception. In this case, there are no such allegations regarding anti-competitive actions by the Trade Associations which are independent of the alleged "conspiracy" with the Board and allegedly give rise to independent causes of action.

In this case, all claims against the Trade Associations are inextricably intertwined with the actions of and claims against the Board. A review of Petitioners' Amended Complaint makes it clear that the claims against the Trade Associations devolve from and are dependant on the claims against the Board. Petitioners do not allege that the Trade Associations have *unilaterally* fixed prices. This is not a mere omission. It is an express and affirmative allegation of fact which provides one of the main premises of Petitioners' case. After alleging that there were discussions of prices among members of the Trade Associations, Petitioners assert that, despite these alleged discussions:

> 4. . . . Ordinarily, . . . each plaintiff would be free to charge for his services as he determined in his individual discretion.

(Amended Complaint, ¶ 4).

Indeed, rather than alleging that the Trade Association themselves fixed prices, Petitioners allege that the Board fixed prices — because it was acting in accordance with a conspiracy with the Trade Associations. Thus, Petitioners allege that:

> 5. The plaintiffs, *nevertheless*, have been and are being forced to charge rates as established by the NJAPHCC and its affiliated local organizations by virtue of a Rule established by the BOARD and the

> actions of the BOARD's members, in particular BIONDI and FEID, in enforcing that Rule.

(Emphasis added). (*See also* Amended Complaint ¶¶ 6-9, 11). Plainly, Petitioners' claims against each of the Respondents, including the Trade Associations, are grounded in their allegation that the Board has used N.J.A.C. 13:32-1.12 to fix prices. Petitioners have expressly alleged that the Trade Associations did *not* fix prices on their own.

The reason is obvious. There is no basis in fact for such an independent claim against the Trade Association. Moreover, even if Petitioners wished to do so, they would not possess standing to assert a claim based solely on alleged discussions among members of the Trade Associations regarding prices. These alleged communications could not cause anti-trust injury to Petitioners as competitors. Absent such an injury, Petitioners would be without standing to assert a Sherman Act claim, even if the Trade Associations had agreed to fix prices, so long as those prices were not predatory. *See* 15 U.S.C. § 15; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1989) (vertical agreement to fix non-predatory prices does not cause antitrust injury conferring standing on competitor); *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 585 n. 8 (1985) (horizontal agreement to fix prices would not cause antitrust injury to competitor absent predatory pricing). There is no allegation in this case that the alleged communications between the members of the Trade Associations regarding prices resulted in predatory pricing. Indeed, Petitioners have admitted that they would not be injured by the alleged pricing practices of the members of the Trade Associations absent the Board's enforcement of N.J.A.C. 13:32-1.12.

Thus, as the District Court noted:

> the crux of plaintiff's complaint is that the Board, in conspiracy with the defendants trade associations, Biondi, Feid and Muller has enforced N.J.A.C. 13:32-1.12 in such a manner as to effectively force plumbers to charge a fixed price for services.

In other words, Petitioner's claims derive exclusively from their contention that the Board has not implemented N.J.A.C. 13:32-1.12 for reasons of proper public policy, but rather has used the rule to fix prices and has done so as a result of a conspiracy with the Trade Associations, Biondi, Feid and Muller. As noted above, such an allegation cannot serve as the basis for a Sherman Act claim against any of the Respondents. As a result, the dismissal of Petitioners' complaint as to all Respondents by the District Court and the affirmance of that dismissal by the Court of Appeals were correct and should be affirmed.

II.

THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS IN THIS CASE ARE IN NO WAY INCONSISTENT WITH THE DECISIONS OF THIS COURT IN *CALIFORNIA RETAIL LIQUOR DEALERS ASS'N v. MIDCAL ALUMINUM, INC.*, 445 U.S. 97 (1980) OR *FEDERAL TRADE COMMISSION v. TICOR TITLE INSURANCE COMPANY*, 504 U.S. 621 (1992).

Petitioners have argued that this Court should grant certiorari because the decisions of the District Court and the Third Circuit Court of Appeals are allegedly inconsistent with the decisions of this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *Federal Trade Commission v. Ticor Title Insurance Company*,

504 U.S. 621 (1992). However, neither of those cases is applicable to the facts herein.[6] Those cases involved regulatory schemes which on their face delegated to private parties the authority to set prices without any involvement by a government agency in evaluating the reasonableness of the prices set. In this case, even if the implementation of N.J.A.C. 13:32-1.12 is treated as price fixing, nothing in the regulation delegates any authority to a private party. All decisions under N.J.A.C. 13:32-1.12 are to be made by the Board. The allegations of involvement by private parties is dependant on the existence of an alleged conspiracy and, as noted above, allegations of conspiracy cannot remove an otherwise immune governmental activity from the state action exception to the anti-trust laws.

In *Midcal,* the challenged state law authorized private producers of wine to fix the prices to be charged by wholesalers. By the terms of the statute in question, the state had no control over the privately set prices and did not review their reasonableness. 445 U.S. at 100, 105. Similarly, in *Ticor,* private title search companies were granted authority under state law to fix prices which they could charge for their services and the states merely reserved the authority to veto those prices, if they chose to exercise it. There was no requirement that the states review the rates set before they became enforceable as matter of law. 504 U.S. at 639-31, 637.

By contrast, the regulatory scheme at issue in this case did not cede any authority to fix prices (or for that matter to take any action whatsoever) to private parties. Indeed, the regulations in question do not even relate to price fixing. They relate to the prohibition of excessive prices — a subject which is surely an

---

6. Plaintiffs also contend that the decisions below suggest that *Omni* overruled *Midcal.* This is not the case. As noted above, *Midcal* is perfectly consistent with *Omni* as it has been applied in this case.

appropriate subject for state regulation of professional practices. Pursuant to N.J.A.C. 13:32-1.12, it is the Board and only the Board which can decide whether a particular plumber has charged excessive prices. Thus, it is the actions of the Board which have allegedly fixed prices not the actions of a private party.[7]

Petitioners' allegation is that the Board did not abide by its responsibilities under N.J.A.C. 13:32-1.12 to prohibit excessive prices, but instead used the regulation to fix prices. Petitioners allege that the Board acted in this manner because of a conspiracy with the Trade Associations, Biondi, Feid and Muller. Thus, this case falls, not within the holdings of *Midcal* and *Ticor* (that legislative and regulatory schemes which cede authority from state government to private parties may not be subject to state action immunity), but within the holding of *Omni* (that an alleged conspiracy by a state agency with a private party will not create an exception to state action immunity to the Sherman Act).

Despite Petitioners' efforts to complicate matters, the position of the Trade Associations is simple. Petitioners' complaint is grounded in the allegation that, as a result of a conspiracy between the Board, the Trade Associations and the Individual Respondents, the Board has used N.J.A.C. 13:32-

---

7. For this reason, the question of "active supervision" by the State does not arise in this case. Active supervision must be considered in a case in which the state regulatory scheme grants authority to a private party to take anti-competitive actions. Under those circumstances, the court must consider whether the anti-competitive actions are actively supervised by the state. The issue does not arise in this case because it is the Board and not the private parties who have allegedly engaged in the anti-competitive actions which have allegedly harmed the Petitioners. As a result, the element of active supervision is not even applicable. The state action exception applies so long as the reasonably foreseeability element of the state action exception is satisfied. *See* Point III, *supra*.

1.12 as a tool for fixing prices. Thus, the plain fact remains that if N.J.A.C. 13:32-1.12 and its enforcement by the Board are immunized from prosecution under the Sherman Act, the identical charges against the Trade Associations must similarly fall. Since it is the enforcement of the Rule by the Board which is at the heart of Petitioners' charges, the alleged actions of the Trade Associations in concert with the Board could not violate the Sherman Act if the Board's adoption and enforcement of the Rule did not violate the Act. For this reason, the District Court's dismissal of all claims against all Respondents including the Trade Associations, and the Court of Appeals' affirmance thereof, should be affirmed.

III.

THE DISTRICT COURT'S DETERMINATION THAT THE REASONABLE FORESEEABILITY ELEMENT OF STATE ACTION IMMUNITY WAS SATISFIED IN THIS CASE WAS IN ACCORDANCE WITH THE PRINCIPLES SET FORTH IN *COLUMBIA v. OMNI OUTDOOR ADVERTISING,* 499 U.S. 365 (1991).

Petitioners urge that certiorari should be granted to consider whether the District Court's determination that the reasonable foreseeability element of state action immunity was satisfied in this case was in accordance with the principles set forth in *Columbia v. Omni Outdoor Advertising*. However, Petitioner's argument betrays a fundamental misconception regarding the meaning of reasonable foreseeability in this context.

Petitioners do not challenge the District Court's determination that the prohibition on excessive pricing in N.J.A.C. 13:32-1.12 was a reasonably foreseeable result of the enactment by the New Jersey State Legislature of an administrative system for the regulation of the trade of plumbing

in New Jersey. *See* Petition for Writ of Certiorari p. 16. Instead, Petitioners contend that this case does not come within the scope of state action immunity to the antitrust laws because the legislature could not have foreseen that the Board would use N.J.A.C. 13:32-1.12 as an alleged tool for the fixing of prices. However, the argument is itself inconsistent with the holding of this Court in *Omni*. In that case, this Court made it clear that the standard for reasonably foreseeability is whether the legislature foresaw or should have foreseen that legitimate and authorized governmental activity could displace competition. It is not relevant that a particular alleged use by a state agency of the authority to displace competition was allegedly not reasonably foreseeable to the state legislature.

In *Omni*, this Court held that, to satisfy the reasonable foreseeability test, "[i]t is enough . . . if suppression of competition is the 'foreseeable result' of what the statute authorizes." 499 U.S. at 373. Therefore, when the "very purpose" of the governmental activity authorized by the legislature is to "displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants", this element of state action immunity is satisfied. *Id.* In *Omni*, this Court made it clear that an alleged use of that authority to restrict competition in a manner which was not intended by the legislature is irrelevant for the purpose of this analysis. Thus, this Court concluded that because zoning by its very nature displaces competition, the alleged misuse of the zoning authority by the City of Columbia to favor one competitor over another was within the reasonable foreseeability prong of state action immunity. *See also Fisichelli v. City Known As Town of Methuen*, 956 F.2d 12 (1st Cir. 1992)(Breyer, J.) (suppression of competition was foreseeable result of authority to grant or deny a development bond in context of state action exception analysis).

Similarly, in this case, the "very purpose" of the governmental activities in question was to "displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." Regulation of licensed professionals is perhaps the quintessential example of a displacement of competition by government. In New Jersey, as in most other states, there is a policy of displacing the market in connection with such professionals. *See* N.J.S.A., Title 45.

Moreover, the regulation at issue was a prohibition on unconscionable pricing and there is a clear state policy against unconscionable pricing. *See e.g. American Trial Lawyers Association v. New Jersey Supreme Court,* 66 N.J. 258, 265 (1974) (practice of law). Obviously, a prohibition on unconscionable prices must, by its very nature, limit competition. If competition were allowed free reign, any pricing, no matter how unconscionable, would be permissible.

The allegations in this case are of the same nature as the allegations in *Omni.* In both cases the authorized governmental activity is of a kind which will foreseeably displace competition. However, in this case, as in *Omni*, the plaintiff contends that the legislature could not have foreseen that the authorized power would be used in the manner alleged, *i.e.*, as an alleged tool of a private party as a result of a conspiracy between the governmental body and the private party. This Court rejected that argument in *Omni.* Accordingly, the decisions of the District Court and the affirmance by the Third Circuit Court of Appeals are totally in accord with the decisions of this Court on the issue of reasonable foreseeability as well. There is no grounds for Petitioners' Petition for a Writ of Certiorari.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT J. ROHRBERGER
Counsel of Record
DAVID I. FOX
FOX AND FOX
Attorneys for Respondents
New Jersey Association of Plumbing, Heating and Cooling Contractors, Inc. and Bayshore Association of Plumbing, Heating and Cooling Contractors
570 Broad Street
Newark, New Jersey 07102
(201) 622-3624